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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY ROBERT LOPEZ,

Defendant and Appellant.

E053425

(Super.Ct.No. RIF10004841)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Raquel M. Gonzalez, Lilia E. Garcia, and Marissa A. Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

Defendant Randy Robert Lopez appeals from judgment entered following a jury conviction for assault with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1)<sup>1</sup>). The jury also found true the allegation that defendant personally inflicted great bodily injury (GBI) in the commission of the assault (§§ 12022.7, subd. (a) & 1192.7, subd. (c)(8)). Following a bifurcated trial on defendant's substantive charges, defendant waived a jury trial and admitted five prior prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)), and two serious or violent felony convictions (strikes) (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)(A)). The trial court sentenced defendant to 25 years to life, plus 13 years in state prison.

Defendant contends the trial court lacked jurisdiction to grant the prosecution's postverdict motion for leave to amend the information, after defendant had waived a jury trial on the prior convictions and the jury was dismissed. Defendant also argues that the trial court failed to obtain proper waivers of his trial rights before he admitted his prior convictions. Defendant further contends he did not effectively admit his prior conviction for witness dissuasion (§ 136.1, subd. (c)(1)), because the alleged date of the prior was incorrect.

We reject defendant's contentions and affirm the judgment. The trial court had jurisdiction to allow the prosecution to amend the information to add a strike

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

enhancement and did not abuse its discretion in granting leave to do so. Additionally, defendant's waiver of a jury trial and admission of his priors, including admission of his prior conviction for witness dissuasion, were proper and do not constitute reversible error.

We acknowledge that prosecutors must juggle heavy caseloads, which can lead to less than perfect pleadings, but the errors in the pleadings in the instant case are troubling. The pleading errors in alleging defendant's prior conviction allegations are a prime example of the serious ramifications and burden placed on the courts and parties as a result of the prosecution not taking the time to carefully plead and review the pleadings. This has led to an unfortunate expenditure of a great deal of time and effort by all those involved in this case, in attempting to address the errors in alleging defendant's prior convictions. The lower court and this court have wrestled with balancing the due process rights of defendant with the People's interest in securing fair and just punishment for defendant's crimes; where defense counsel was well aware of the erroneous allegations early on in the proceedings yet, for tactical reasons, chose not to bring the errors to the court's attention until right before sentencing. We conclude, as the trial court did, that the prosecution could lawfully amend the information to correct the obvious errors in the pleadings. We emphasize this decision is narrowly tailored to the unique circumstances of this case.

## II

### FACTS

This appeal only concerns sentencing issues and therefore the facts of the underlying substantive crime are only briefly summarized as follows. At the time of the charged offense, in July 2010, defendant lived with five other men at Mock House, a church-run home for parolee sex offenders. Defendant shared a room with Derrick Greer.

On July 2, 2010, defendant wanted Greer to buy beer for him, even though alcohol was not permitted at Mock House. Shortly after midnight on July 3, 2010, defendant stabbed Greer in the torso with a knife during an altercation over Greer refusing to purchase beer. Greer was hospitalized for six days and had a 10-inch long scar from three stab wounds. The police recovered the knife.

## III

### AMENDED INFORMATION

Defendant contends the trial court did not have authority to grant the prosecution leave to amend the information after the jury returned its verdict and was discharged.

#### *A. Procedural Background*

At the beginning of the jury trial, the trial court granted defendant's motion to bifurcate trial of the substantive charges from the prior conviction allegations. Defendant reserved his jury trial right on his priors. In addition to alleging five prior convictions, including committing a lewd act on a child under 14 by force (§ 288, subd. (b)), the information alleged as a serious prior offense, defendant's February 2, 2006, conviction

for dissuading a victim from testifying (§ 136.1, subd. (c)(1)). The information additionally alleged the following two offenses as strikes: (1) defendant's February 2, 2006, conviction for failing to register as a sex offender (§ 290, subd. (g)), and (2) defendant's February 2, 2006, conviction for dissuading a victim from testifying (§ 136.1, subd. (c)(1).)

After the jury found defendant guilty of assault and the jury was dismissed, defendant waived a jury trial on his priors and admitted all of his prior offenses, which included the following convictions:

- (1) failing to register as a sex offender, February 2, 2006 (§ 290, subd. (g)(2));
- (2) committing a lewd act on a child under 14 by force, January 16, 1996 (§ 288, subd. (b));
- (3) possession of a firearm with a prior felony conviction, January 11, 1995 (§ 12021, subd. (a)(1));
- (4) receiving stolen property, January 9, 1993 (§ 496);
- (5) possession of a controlled substance, June 22, 1989 (Health & Saf. Code, § 11350);
- (6) dissuading a victim from testifying, February 2, 2006 (§ 136.1, subd. (c)(1)).

Defendant filed a motion to dismiss his two strikes under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero* motion). Defendant also moved to dismiss the first prior strike enhancement (failing to register as a sex offender) on the ground the conviction was not a serious or violent felony and therefore did not qualify as a prior strike enhancement.

The prosecution agreed in its sentencing memorandum that defendant's conviction for failing to register as a sex offender did not qualify as a strike. The prosecution requested leave to file an amended information deleting the offense as a strike, and substituting it with defendant's prior conviction for committing a lewd act on a child under 14 by force (§ 299, subd. (b)). This offense was already alleged as one of defendant's prison prior enhancements.<sup>2</sup>

At the sentencing hearing, the prosecutor argued the prosecution committed a clerical error when it listed defendant's conviction for failing to register as a sex offender as a strike. The prosecutor claimed this did not come to light until after defendant was convicted of the charged assault offense. Defense counsel objected to the proposed amended information on the ground that it was too late to amend the information under *People v. Gutierrez* (2001) 93 Cal.App.4th 15 (*Gutierrez*). Defense counsel argued defendant was deprived of his right to a jury trial on the issue of whether the offense was a prior strike enhancement, because when he admitted the prior, it was alleged as a prison prior, not as a strike. Changing the lewd act conviction from a prison prior to a strike increased the sentence enhancement on the lewd act prior from one year to 25 years to life.

During the continued sentencing hearing on April 22, 2011, the trial court heard the prosecution's motion to amend the information. Defense counsel informed the court

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<sup>2</sup> The prosecution also moved to correct the date of the other strike conviction (dissuading a victim to testify), which should have been alleged as entered on January 16, 1996, not February 2, 2006.

that she would not have advised defendant to admit the strike enhancements had the prosecution alleged two proper strikes: “I would have never advised Mr. Lopez to admit his prior strikes had it been a third-strike case, and the advice that I gave him to make the admission was based on the fact that it was improperly alleged.” Defense counsel said she advised defendant to admit his priors based on the fact one of the strikes (sex offender registration) was not a proper strike and therefore the case was not a Three Strikes case.

The prosecution responded that the entire time, up until defendant filed his postverdict motion to dismiss the sex offender registration strike, the case was treated as a Three-Strikes case, with 20 peremptory challenges. After lengthy oral argument, the trial court granted the prosecution’s motion to amend the information. The court then heard and denied defendant’s *Romero* motion.

#### *B. Applicable Law*

The issue here is whether the lewd acts prior, which was initially alleged as a prison prior, could later be changed to a strike, after defendant had waived his right to a trial of his prior convictions, the jury was dismissed, and defendant had admitted all of his priors, including the lewd acts conviction. The trilogy of cases, *People v. Valladoli* (1996) 13 Cal.4th 590 (*Valladoli*), *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*), and *Gutierrez, supra*, 93 Cal.App.4th 15, is instructive on the issue but does not resolve it. This is an issue of first impression, to the extent the new strike had already been alleged in the original information as a prison prior. In *Valladoli*, the People filed a complaint alleging 10 conviction enhancements. At the preliminary hearing, the magistrate

dismissed one of the substantive counts and the related priors. Since the second substantive count remained, the priors should have been alleged in the information as to the surviving count, but were inadvertently omitted. The People did not notice the inadvertent error until after entry of the jury verdict on the substantive charges. Before the jury was dismissed, the prosecution moved to amend the information to add the prior felony conviction allegations. The defendant objected. The trial court granted the motion to amend. (*Valladoli*, at pp. 595-596.)

The California Supreme Court in *Valladoli* court rejected the defendant's argument that the trial court lacked jurisdiction to grant leave to amend the information after entry of the verdict on the substantive charges. (*Valladoli*, *supra*, 13 Cal.4th at p. 597.) The court in *Valladoli* stated that section 969a gives the trial court discretion, up until sentencing, to grant leave to amend the information to add priors. (*Valladoli*, at p. 603.) This includes, not only priors that were unknown or newly discovered, but also priors that were known or omitted through clerical error. (*Id.* at p. 606.) The *Valladoli* court also held there was no due process violation of the defendant's right to notice of the newly charged priors, because the amended information provided sufficient written notice and the defendant may request a continuance if additional time is required to prepare to meet the new charges. (*Id.* at pp. 597, 606-607.)

The *Valladoli* court stated that, in exercising its discretion to grant leave to amend postverdict, the trial court should consider: "(i) the reason for the late amendment, (ii) whether the defendant is surprised by the belated attempt to amend, (iii) whether the prosecution's initial failure to allege the prior convictions affected the defendant's



decisions during plea bargaining, if any, (iv) whether other prior felony convictions had been charged originally, and (v) whether the jury has already been discharged (see § 1025).[] This list, of course, is intended to be illustrative rather than exhaustive, and we reiterate the matter is best left to the discretion of our trial judges.” (*Valladoli, supra*, 13 Cal.4th at pp. 607-608.)

The *Valladoli* court noted it expressed no opinion on whether postverdict amendments adding prior felony convictions are permissible after the jury has been discharged. (*Valladoli, supra*, 13 Cal.4th at p. 608, fn. 4.) A few years later, in *Tindall*, the California Supreme Court addressed this issue, but limited its holding to when the defendant requests a jury trial on the new priors. In *Tindall*, the People charged defendant with drug possession and alleged several prior nonstrike conviction enhancement allegations. The jury found defendant guilty of the substantive offense, and defendant waived his right to a jury trial on the prior conviction allegations. After the court discharged the jury, the People discovered for the first time three additional prior convictions. Over the defendant’s objection, the trial court granted the People’s motion to amend the information to add the three strikes. The defendant invoked his right to a jury trial on the strike allegations. The court empanelled a new jury and tried the prior convictions.

In *Tindall*, the court addressed the potential conflict between a defendant’s statutory right under section 1025, subdivision (b), to have the same jury determine the substantive charges and priors, and the court’s authority under section 969a, to allow the People to amend the information to add a previously uncharged prior conviction. In

interpreting section 1025, subdivision (b), the court observed: “The statute is clear in its procedural instructions--the same jury that decides the issue of guilt shall also decide the truth of the alleged prior convictions, unless jury trial is waived. [Citation.] Indeed, because a defendant may forfeit the right to have the same jury under section 1025 [citation], he thus possesses that right and may forfeit, waive, or *invoke* it.” (*Tindall, supra*, 24 Cal.4th at p. 774 [emphasis original].) The court characterized the defendant’s right under section 1025, subdivision (b), as a procedural requirement, rather than a statutory preference. (*Tindall*, at p. 776.)

Based on this procedural requirement, the court held that, although section 969a authorizes the court to grant leave to add a prior up until formal sentencing, such authority is limited where the jury has been discharged, unless the defendant has waived or forfeited his right to have the same jury decide the truth of his prior convictions. (*Tindall, supra*, 24 Cal.4th at p. 776.) The defendant in *Tindall* did not waive his right to the same jury. Rather, the defendant invoked his right when the People moved to amend the information. Because the defendant invoked this jury trial right under section 1025, subdivision (b), allowing the prosecution to amend the information and proceed with a newly empanelled jury, violated the defendant’s statutory right to a trial by the same jury.

Unlike the defendant in *Tindall*, defendant in this case did not invoke his right to a jury trial on his prior convictions. While the court in *Tindall* established the rule that section 1025, subdivision (b), precludes an amendment under section 969a after the jury has been discharged, the court also provided an exception where the defendant has forfeited or waived his right to a jury trial. (*Tindall, supra*, 24 Cal.4th at p. 782.) The

*Tindall* court noted that “we do not consider whether a postdischarge amendment is proper after the guilt phase jury has been discharged, when the only contested issue in a defendant’s trial on the alleged prior convictions is an issue to be decided by the court, and not the jury.” (*Id.* at p. 772, fn. 4, citing § 1025, subd. (c) and *People v. Kelii* (1999) 21 Cal.4th 452, 454.)

In *Gutierrez, supra*, 93 Cal.App.4th 15, the court held that the trial court erred in allowing a postverdict amendment after the defendant waived his right to a jury trial on the defendant’s prior convictions. (*Id.* at p. 24.) The defendant in *Gutierrez* was charged with two felonies, two firearm enhancements, and five prior conviction enhancements, including one prior strike enhancement. The defendant waived his right to a jury trial on the prior convictions. After the jury returned verdicts against defendant on the substantive offenses and the firearm allegations, the court dismissed the jury and held a bench trial on the prior conviction allegations. After the bifurcated trial on the priors, the prosecutor filed a motion to amend the information to add newly discovered prior convictions. The defendant objected to the amendment.

The defendant in *Gutierrez*, argued that his earlier waiver had no effect on the newly discovered prior convictions. The court agreed that the defendant only waived his statutory right to have the same jury decide the prior conviction allegations included in the information at the time of his waiver. (*Gutierrez, supra*, 93 Cal.App.4th at p. 24.) Because the out-of-state prior had not yet been alleged, the defendant’s waiver did not extend to that allegation. The defendant was not required to object when the jury was discharged because, at the time, defendant had no knowledge of the new priors. (*Ibid.*)

### *C. Analysis*

The instant case is distinguishable from *Gutierrez*. Here, all of defendant's priors were pled in the original information, including the lewd act prior. The postverdict amendment thus did not add a new prior conviction. It added an allegation that the lewd act prison prior was not only a prison prior, but also a strike. The lewd act prior replaced the originally alleged first strike because the sex offender registration prior did not qualify as a strike. Under these circumstances, we conclude the trial court had jurisdiction under section 969a to grant leave to amend and there was no abuse of discretion in doing so under the five-factor *Valladoli* test. First, the reason for the late amendment was clerical error. The prosecution erroneously alleged the sex offender registration prior as a strike, and did not allege the lewd acts prior as a strike but, rather, as a prison prior, most likely because there were already two strikes alleged.

Second, defendant was not surprised by the belated attempt to amend. The lewd acts conviction was already alleged as a prison prior and clearly qualified as a strike but was not alleged as such. Defense counsel acknowledged she was well aware one of the strikes did not qualify as a strike but did not raise the error until after the jury was dismissed. Defense counsel delayed bringing the pleading error to the court and prosecution's attention until the jury was dismissed, perhaps for tactical reasons in the hope it would be too late to rectify the pleading error.

Third, the prosecutor noted during the hearing on the motion to amend that the failure to allege the lewd act prior as a strike did not affect defendant's decisions during plea bargaining because the case was treated as a Three Strikes case from its inception

and neither the defense nor the People made an offer. The trial court found that any error in not alleging the lewd act prior as a strike did not have an impact on plea bargaining. The court noted defense counsel had told the court defendant would not settle because he believed he was not guilty. In addition, the People would not plea bargain on a Three Strikes case.

Fourth, all of the prior convictions were alleged in the original information, including the lewd act prior. The purpose of an information is to provide defendant with notice of the *facts* supporting the charges against him “that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.” (*In re Hess* (1955) 45 Cal.2d 171, 175.) Defendant had notice of the *fact* of the lewd act prior. The legal effect of a prior felony is not a fact which must be submitted to a jury. (*People v. Epps* (2001) 25 Cal.4th 19, 28; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154-155 & fn. 7.) Section 969 governs “charging the fact of a previous conviction of a felony” and provides for simple pleading, the only specific requirement being that “the title of the court in which the conviction was had” be included. (§ 969.) Defendant was on notice of, and admitted suffering, each prior conviction. Only the legal effect of the lewd acts and sex offender registration priors were initially erroneously alleged. These clerical errors were corrected in the amended information before sentencing.

As to the fifth factor, the jury was already discharged when the motion to amend was filed and granted. However, defendant had already admitted the priors. Even though the jury had already been discharged when the trial court heard and granted the motion, it

was not too late to amend to add the lewd act strike because defendant had already alleged it as a prior, waived his right to a jury trial of his priors, and admitted his priors, including the lewd act prior. Changing the legal effect of the lewd act prior to a strike was permissible since the legal effect of the prior on sentencing was a legal issue for the court, not a factual issue for the jury.

Defendant complains that after the information was amended, the trial court failed to rearraign defendant on the new strike charge, as is required under sections 969a and 1009. Defendant did not raise this objection in the trial court and there was no showing of prejudice in not rearraigning defendant, since defendant had already admitted the priors. (*People v. Turner* (1994) 8 Cal.4th 137, 186-187.)

Where the information is amended, regular and orderly procedure requires that a defendant be rearraigned and that he plead to the information. But if a defendant makes no demand or objection and has already admitted his prior convictions, objection that there was no arraignment is waived and the point is unavailable on appeal. (*People v. Turner, supra*, 8 Cal.4th at pp. 186-187.) Furthermore, any oversight in not rearraigning defendant on the amended information was harmless error. The amendment was for purposes of correcting a clerical error, of which defendant was aware, and which did not change the factual nature of the alleged substantive offenses or priors.

We conclude it was not too late to amend the information to add the lewd act strike. The trial court still had jurisdiction to grant leave to amend the information until sentencing, and there was no abuse of discretion in doing so.

## IV

### WAIVER OF TRIAL RIGHTS

Defendant contends the trial court failed to obtain proper waivers of his constitutional rights before defendant admitted his prior convictions. Defendant argues the trial court did not adequately advise him of his constitutional rights against self-incrimination and to confrontation, before waiving his rights and admitting his priors. Defendant further asserts that the record fails to demonstrate his admissions were voluntary and intelligently made under the totality of circumstances.

#### A. *Applicable Law*

A criminal defendant who pleads guilty, waives three constitutional rights: (1) the privilege against self-incrimination, (2) the right to a jury trial, and (3) the right to confront one's accusers. A waiver of these fundamental constitutional rights must be made knowingly, intelligently, and voluntarily. Such a waiver may not be presumed from a silent record. The record must affirmatively disclose that the waiver was made knowingly and voluntarily. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243.) In California, the same rule applies to admitting a prior conviction or prior prison term allegation. (*In re Yurko* (1974) 10 Cal.3d 857, 863.)

The California Supreme Court in *In re Tahl* (1969) 1 Cal.3d 122, 132-133 held that the trial court must advise a defendant, on the record, of his or her rights against self-incrimination, to a jury trial, and to confrontation, and the defendant must waive these rights, on the record, before the trial court accepts a guilty plea. (*Ibid.*) After *Tahl* was decided, the California Supreme court clarified in *People v. Howard* (1992) 1

Cal.4th 1132 (*Howard*), that the requirement of such advisals is a matter of the court's own supervisory powers and not a matter of federal constitutional law. (*Id.* at p. 1175.) Therefore, even when a trial court fails to advise a defendant of his or her constitutional rights, a guilty plea "is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations.]" (*Ibid.*)

The Supreme Court explained in *People v. Mosby* (2004) 33 Cal.4th 353, 361 (*Mosby*), that, "After our *Howard* decision, an appellate court must go beyond the courtroom colloquy to assess a claim of *Yurko* error. [Citation.] Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances." (*Ibid.*) Thus, a defendant who admits a prior conviction without expressly waiving his or her rights to remain silent and confront adverse witnesses may nevertheless be found to have made a voluntary and intelligent waiver of those rights so long as "the totality of circumstances surrounding the admission supports such a conclusion." (*Id.* at p. 356; see also *Howard, supra*, 1 Cal.4th at p. 1178.)

The court in *Mosby* distinguished between two types of cases in which defendants admitted prior convictions after a jury trial on the substantive charges: (1) truly silent record cases, those in which the record showed "no express advisement or waiver of the *Boykin-Tahl* rights before a defendant's admission of a prior conviction" (*Mosby, supra*, 33 Cal.4th at p. 361); and (2) incomplete *Boykin-Tahl* advisement cases, those in which



defendants had been advised of their right to a jury trial, but not of the other two constitutional rights. (*Mosby*, at pp. 362-364.)

With regard to the truly silent record cases (e.g., *People v. Stills* (1994) 29 Cal.App.4th 1766; *People v. Campbell* (1999) 76 Cal.App.4th 305; *People v. Moore* (1992) 8 Cal.App.4th 411; *People v. Johnson* (1993) 15 Cal.App.4th 169 [nearly silent]), *Mosby* concluded the defendants' admissions were not voluntary and knowing: "In all of the [silent record] cases . . . a jury trial on a substantive offense preceded the defendants' admissions of prior convictions. These defendants were not told on the record of their right to trial to determine the truth of a prior conviction allegation. Nor did they expressly waive their right to trial. In such cases, in which the defendant was not advised of the right to have a trial on an alleged prior conviction, [it] cannot [be inferred] that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*Mosby*, *supra*, 33 Cal.4th at p. 362.)

In the incomplete advisement cases (*People v. Carroll* (1996) 47 Cal.App.4th 892; *People v. Howard* (1994) 25 Cal.App.4th 1660; *People v. Torres* (1996) 43 Cal.App.4th 1073; *People v. Garcia* (1996) 45 Cal.App.4th 1242), the defendants had participated in jury trials and thereafter admitted priors. Their admissions were made after they were advised of the right to a jury trial, but not of the rights to confront witnesses or against self-incrimination. The Courts of Appeal held that the totality of circumstances in those cases did not show the admissions were voluntary and intelligent, and the incomplete advisements required reversal. *Mosby* disapproved these incomplete advisement cases,

as well as *People v. Van Buren* (2001) 93 Cal.App.4th 875. (*Mosby, supra*, 33 Cal.4th at p. 365, fn. 3.)

In *Mosby*, “immediately after the jury found defendant guilty of selling cocaine, defendant was told he had a right to a jury trial on the prior conviction allegation.” (*Mosby, supra*, 33 Cal.4th at p. 364.) The defendant thereafter admitted the prior convictions. (*Id.* at pp. 357-359.) *Mosby* reasoned that “unlike a trial on a criminal charge, trial on a prior conviction is ‘simple and straightforward,’ often involving only a presentation by the prosecution ‘of a certified copy of the prior conviction along with the defendant’s photograph [or] fingerprints’ and no defense evidence at all. [Citation.] [In *Mosby*], [the] defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.” (*Id.* at p. 364.) In addition, the *Mosby* court pointed out that “‘a defendant’s prior experience with the criminal justice system’ is . . . ‘relevant to the question [of] whether he knowingly waived constitutional rights.’” (*Id.* at p. 365, quoting *Parke v. Raley* (1992) 506 U.S. 20, 37; see also *United States v. Dawson* (9th Cir. 1999) 193 F.3d 1107, 1110-1111.)

Under the totality of circumstances, *Mosby* concluded that the “defendant voluntarily and intelligently admitted his prior conviction despite being advised of and having waived only his right to jury trial.” (*Mosby, supra*, 33 Cal.4th at p. 365.) “[H]e

knew he did not have to admit [the prior conviction] but could have had a jury or court trial, had just participated in a jury trial where he had confronted witnesses and remained silent, and had experience in pleading guilty in the past, namely, the very conviction that he was now admitting.’” (*Ibid.*)

### *B. Discussion*

The instant case falls within the second category of cases discussed in *Mosby*, in which defendant was advised of his right to a jury trial, but not of his rights against self-incrimination and to confrontation. (*Mosby, supra*, 33 Cal.4th at pp. 362-364.) We therefore must determine, based on the totality of circumstances, whether defendant’s admissions of his prior convictions were voluntary and intelligent. We conclude they were. At defendant’s in-custody arraignment on August 4, 2010, the trial court advised him of his constitutional rights against self-incrimination, to a jury trial, and to confrontation at his in-custody arraignment on August 4, 2010. The trial court again advised him of his trial rights at his informal arraignment on August 18, 2010. He was also advised of his charges and consequences of his plea and statutory sentencing.

On February 8, 2011, at the inception of the trial, defendant requested bifurcation of his priors and reserved his decision on whether to waive jury trial on his priors. Defense counsel said she wanted to discuss further the issue with defendant. While the jury was deliberating, defendant informed the court that he was willing to waive a jury trial on his priors. The trial court responded, “[Y]ou do understand that you do have the right to the same jury to decide whether or not you suffered those prior convictions in the event you are convicted in this case? Nevertheless, do you wish to give up that right; is

that correct?” Defendant replied, “Yes.” Right after the jury entered its verdict, finding defendant guilty of the substantive charge of assault with a deadly weapon and finding true the GBI allegation, the jury was dismissed and defendant expressly admitted on the record, each prior conviction allegation, including each prison prior, strike prior and serious felony prior.

These circumstances reflect that defendant’s waiver of rights and admission of his priors was made voluntarily and intelligently. He was advised of his trial rights at two arraignment hearings and was also advised of his right to a jury trial of his priors, before agreeing to waive a jury trial and admit his priors. Defendant had just completed a contested jury trial, during which he exercised his right not to testify, and observed the confrontation of witnesses against him. In addition, defendant had a lengthy criminal history, dating back 25 years. Under the totality of the circumstances, we conclude defendant was well aware of his trial rights when he waived his right to a jury trial of his priors, and defendant’s admission of his priors was made voluntarily and intelligently.

## V

### PRIOR CONVICTION FOR WITNESS DISSUASION

Defendant contends he did not effectively admit to suffering a prior conviction for witness dissuasion (§ 136.1, subd. (c)(1)) because the stated date of the conviction he admitted was incorrect. The original information alleged the witness dissuasion prior as both a serious prior offense and a strike. The alleged date of the conviction was February 2, 2006. When defendant admitted the prior conviction, the trial court asked him: “With respect to the serious prior offense the People allege that on or about February 2nd, 2006,

that you were convicted of the crime of preventing and dissuading a witness from reporting and testifying by threat in violation of Penal Code 136.1. [¶] Were you so convicted?” Defendant responded, “Yes. I was incarcerated during that time.”

Defendant argues his answer was nonresponsive and vague. Defendant acknowledges he was incarcerated on February 2, 2006, but this was not for violating section 136.1. We disagree. Defendant clearly admitted he was convicted of the offense but then added that on the stated date of February 2, 2006, he was incarcerated. This was in fact true. He was incarcerated for another offense. According to defendant’s sentencing memorandum and the probation report in the instant case, the witness dissuasion conviction occurred on or about January 16, 1996. When defendant was convicted of the witness dissuasion offense, he was also convicted of violating sections 243.4, subdivision (d) (sexual battery) and 288, subdivisions (a) and (b) (lewd act upon a child under the age of 14 years, by use of force). Defendant’s sentencing memorandum states that defendant committed these crimes at the same time, when he raped a young girl and then threatened to harm her if she told anyone.

Defendant argues that, because the witness dissuasion conviction did not occur on February 2, 2006, but rather on January 16, 1996, he did not effectively admit to suffering the alleged witness dissuasion prior. Even though the information was later amended to correct the date of the prior conviction, defendant asserts he never admitted suffering a January 16, 1996, conviction for witness dissuasion. Defendant further notes the amended information only corrected the date of the strike but not the serious prior offense allegation.

It is clear from the record that defendant was on notice of the witness dissuasion conviction prior, even though the date was incorrectly alleged in the original information. The incorrect date is not material because the witness dissuasion conviction arose from the same incident as the lewd act prior, in which the conviction date was alleged as January 16, 1996. Defendant's sentencing memorandum describes the facts of the lewd act prior and witness dissuasion prior, and states the convictions for the offenses occurred on the same date. The information was later amended to correct the clerical mistake as to the date of the witness dissuasion prior and there was no prejudice in initially misstating the date of the witness dissuasion prior.

In *In re Williams* (1968) 257 Cal.App.2d 592, 595, the court held that incorrectly alleging the dates of several prior convictions in the information was a technical error which did not require reversal. In *Williams*, the defendant brought a habeas corpus petition to set aside an adjudication of habitual criminality on the ground that there was a variance between the adjudicatory pleading and the proof as to the defendant's prior convictions. (*Id.* at p. 594.) The court observed that, with respect to allegations of prior convictions, the need for particularity is diminished because the defendant himself has knowledge of his prior record. (*Id.* at p. 595.) Thus, when the pleading inaccurately referred to the date of the prior conviction, but the proof showed a different day, the court held that the inaccuracy was technical only, and "[i]t did not prejudice defendant since he had in fact suffered such a conviction, although in June rather than November." (*Ibid.*) The *Williams* court noted that "In measuring the materiality of a variance between the accusatory pleading and proof, the basic concern is whether the defendant was misled in

the preparation of his defense. [Citation.] In the allegation of prior convictions the need for particularity is somewhat diminished because the defendant himself has knowledge of his prior record. [Citations.]” (*Ibid.*)

Here, the incorrectly alleged conviction date in the original information was not a material pleading defect requiring reversal. It is apparent from the record that, when defendant admitted the prior, he was on notice of the prior and was aware he was admitting it, even though the stated date was incorrect. We therefore reject defendant’s contention that the admission was invalid or that defendant was prejudiced in any way by the original information alleging the incorrect date of the witness dissuasion prior.

## VI

### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.